AN APPENDIX TO THE OFFICE and DUTY OF AN EXECUTOR.

A Teſtament differs from a laſt Will in the naming an Executor, and it is thus defined. *Teſtamentum eſt voluntatis noſtræ juſta ſententia de eo quod quis poſt mortem ſuam fieri voluit.* Teſtament.

If one demand of *B* who ſhall be his Executor, and he name *D*; or if *B* ſay, I mean to make *D* my Executor, yet *D* is not Executor, unleſs it be probable that

B had at that time *animum teſtandi.*

A is compelled by fear or menace, or urged by Violence to make his Will, this is void, yet a modeſt requeſt to one to make his Will, is allowable.

If any perſon refer his Will to another to declare and name an Executor for him, and he do it, this is void.

Codicil. A Codicil, is like a Boat tied to a great Ship: there is no Executor named therein, it may be written or nuncupative; made before or after the Teſtament, or by one dying inteſtate, and perhaps long before his death, and yet it may be good; for being made before a Teſtament, it will be good, unleſs it be revoked by a Teſtament, or be contrary to it.

If two Teſtaments be found, and no knowledge which was made firſt, and they differ both in matter and circumſtance; both ſhall be void; not ſo of a Codicil unleſs the one impugn the other.

Legacy. Things given and delivered by a Teſtator in his life time, are no Legacies.

A named *B* his Executor, who cannot or will not intermeddle; Adminiſtration muſt be granted by *Statute cum teſtamento annexo*, which makes the Legacies thereby given due both by Law and the

the cuſtom of *England.* But the civil Law holds the contrary to this.

A bequeaths Corn growing or Goods unto one: A Stranger will not ſuffer the Executor to perform the Will, he ſhall ſue him in the Spiritual Court. *Contra* if a Stranger take the Teſtator's Goods from the Executor, there he may have an Action of Treſpaſs at the Common Law.

A Teſtament dated at *Cane* in *Normandy*, and proved afterwards in *England* is good. Legacies are to be recovered in Court Chriſtian, ſo if a Termor deviſe his Crop or Goods: But of Franktenement or Inheritance, the Legatee may enter without further Aſſignment.

A bequeaths Goods to repair the Fabrick of a Church, if they be detained they muſt be recovered in the Eccleſiaſtical Court, ſo muſt a Wardſhip and Chattels real when bequeathed, be recovered.

A charges his Executor to pay his Debts, the Creditor in reſpect of this charge may ſue in the Eccleſiaſtical Court. So if an Executor be charged to build a Grammar School, and he neglect it.

Among the Ancient *Romans* there was

Solemn Teſtament.

a Will, called a *Solemn Teſtament*, which was proved by ſeven Witneſſes, and all their Seals affixed to it, or elſe it was deemed void; but now two ſufficient and credible Witneſſes ſuffice.

In a Deviſe of Lands it muſt be in the life time of the Teſtator and in writing. But of Land deviſable before the Statute, the Teſtament is good if it be probable.

One dying inteſtate, the Widow or next of Kin ſhall have Adminiſtration: See the *Stat.* 21 *H.* 8. 5. but ſee alſo 31 *E.* 3. 11. but theſe are both altered by the late Statute made in his now Majeſtie's Reign.

Teſtaments written by others being read and allowed before the Teſtator are good, or if a Notary take brief Notes and write them in form at large, and the Teſtator die before he hear it read, yet it is good to paſs Lands and Tenements.

Lands will not paſs by a Nuncupative Will by the *Stat.* 32 *H.* 8. yet in Burgage tenure it may be the contrary.

A Teſtator writeth his Will with his own hand, or cauſeth it to be written in his preſence, and after ſhews it to witneſſes, and then ſealing it up, ſays, This

is

is my last Will; this will be a good Testament; but it is necessary such witnesses write their names on the backside.

A Testator says such a one naming *B*, hath his Will in keeping, and after dies, *B* produceth a Will and is sworn to it, yet he must prove it at least *communi formâ*, or if put to it *per testes*, who can prove the hand and other circumstances.

Testaments Priviledged.

Besides them there are Military or Priviledged Testaments, and those of three sorts. 1. Among Souldiers, they may have two and both good according to meaning, these Souldiers were anciently divided into three Kinds: 1. *Milites armati*, 2. *Milites Literarii*, 3. *Milites cœlestes*, that the *Milites armati*, the active Souldiers had this priviledge is not to be doubted: but the 2. *Milites literarii* who were Doctors of the Law, and the 3. *Milites cœlestes*, who were Divines were but metaphorical Souldiers, and it hath been a continued doubt whether they ought to have this Priviledge.

The second sort of Priviledged Testaments is called *Testamentum in Liberos*, and in such case where two Testaments are found, and the first is to the use of Children, this will not easily be avoided

by a latter Will giving Goods to ſtrangers, unleſs in the latter there be a ſpecial revocation, or elſe it be made *in pios uſus*, or upon ſome great diſagreement, that had of late happened between the Father and Children. But if two be found of one date, and the one favours Children, and the other hath a contrary face or deſign, that that favours the Children, ſhall have the more favourable allowance, becauſe it carries the Eſtate to the blood, which the Law is very tender of.

The third ſort of Priviledged Wills is *Ad Pias cauſas*, whereby a Legacy being given to young Orphans, Widows, lame, diſeaſed, poor, needy and miſerable perſons, or to Hoſpitals, Churches, repairing Bridges, City-walls, *&c.* Theſe priviledged Teſtaments may be written with any Characters, Figures, Language, *&c.*

A Teſtament *ad pios uſus* found cancelled, unleſs there be a poſitive proof of cancelling the ſame, ſhall be preſumed to be done unadviſedly, and ſo conſequently good.

Two Teſtaments are found: 1. *Inter Liberos*, 2. *Ad pios uſus*, both of one date,

date, of these the first shall be judged good, because the Children have a first right, *& jure successionis* shall be admitted.

CHAP. II.

What Persons may make a Testament.

Children. NOne under twenty one years of Age may devise Lands, Tenements, or other Hereditaments: But of Goods a Boy at fourteen, and a Girl at twelve may dispose, but not before, though *ad pios usus:* nay in truth it is voidable being so made in Minority, unless (if when they come to full Age) it be confirmed, for then it will be good.

Mad and Lunatick. Mad and Lunatick persons cannot dispose of any thing during their Madness and Lunacy, though *ad pios usus:* but if they have *lucida intervalla*, it is held otherwise.

A being *compos mentis*, makes his Will, after he becomes *non compos*, and during that incapacity would disannul it, this will not avoid it, for the first Will stands good. And here note, that every man and

and Woman is ſuppoſed to be of ſound and perfect mind and memory unleſs poſitive proof be made to the contrary. Words only are not a ſufficient proof of ſanity of mind or to ſet forth the reaſonable faculty. For a Parrot may be taught ſignificant words, yet none will aver them to proceed from an inſtinct of reaſon, no more than they can aſſert *Balaams* Aſs a reaſonable creature, becauſe by miracle it's mouth was opened to reaſon with it's Maſter.

Old Men. An old Man, who is ſo ſuperannuated that he has forgot his own name, is held unfit to make a Will. So a Man *in extremis*.

Villains. The old Law of Slaves and Villains, was this; their Lands, Goods and Children gotten by themſelves, or given them by others, were all in bondage. For whatever ſuch a bondſlave getteth, it is his Lords; for if a Villain make a Will of his Lands, or Tenements, or Goods, and the Lord enter before the Will proved; the Will ſhall be void, and the Lord ſhall have them. But this Law is (though not abrogated) yet ſo long diſuſed, that it is of no force.

Priſoners. If a Man be condemned to perpetual impri-

imprisonment upon a criminal account he cannot make a Will; But a Prisoner for Debt may, so it be not to defraud his Creditors.

A Woman Covert cannot devise Lands, Tenements, or Hereditaments, neither to her Husband or any other; 1. Not to her Husband for these reasons. 1. For that may be in prejudice of the Heir. 2. Albeit she did of free will, and without constraint, for the tye is not apparently taken off. 3. Although the Will were made before Marriage, for the Testator must be in as good power at the time of death as of the making the Will; 4. If the Wife make a Will during Coverture, and then survive her Husband, this is supposed void, unless she confirm it after the Husbands death; But if such Will were made before Marriage by her, and she survive, that will be good. Feme Covert.

She may dot devise Goods and Chattels without consent of her Husband, but by his licence peradventure she may.

In some few cases a Feme Covert may make a Will without her Husbands licence, as first an Empress or Queen, so it

it be not in prejudice of her Husband or his Regality. 2. When any thing is due to the Wife whereof ſhe was never poſſeſſed during the coverture; neither may the Husband bequeath a choſe in action, as an Obligation, *&c.* which he hath only in the right of his Wife, if he be not joyned with her, or the property altered after Marriage. 3. A Woman betrothed to a Man, may before eſpouſals make a Will. 4. If a Wife be Executrix to another, ſhe may diſpoſe of thoſe goods, elſe might the next of Kin have adminiſtration *de bonis non adminiſtratis* of her Teſtator, for where an Executor dyes inteſtate, the Teſtator from that time is deemed to dye inteſtate.

A Wife may appoint her Husband her Executor, but ſuch Wife is reſtrained from making ſuch a Will two ways, 1. Unleſs ſhe appoint an Executor, her Will will be void. 2. If ſuch Wife have any Goods as Legatary from the Teſtator, and which ſhe receiveth as Legatary, not as Executor, they are her Husbands, and ſo not by her deviſable: alſo increaſe of goods during the coverture which the Wife has as Executrix, as Calves, Lambs, and the like, the ſame redound to the Husband and not to her.

A Wife or other Executor and Legatary is deemed to accept Goods as Legatary, not as Executor, unleſs by Proteſtation or ſome other means, the contrary appear, for it is her better Title and more free; yet this is according to the rule of the civil Law, but not agreeable to the Law of the Land.

If a Husband be bound, or do voluntarily licence the Wife to make her Will before Marriage, and ſhe make two or three, the laſt is that muſt ſtand.

A deaf and dumb perſon, not knowing what a Teſtament is, cannot make a Teſtament, but if he were not deaf, *a partu & naturaliter*, but he became afterwards deaf and dumb by accident, or otherwiſe, he may do it by ſigns, but it will be better if he can write. He that can ſpeak could once hear, *Ergo*, he may make a will. Deaf and Dumb.

Dumb and not deaf, may make a will by ſigns, ſo as the ſame be well known to witneſſes.

A blind Man, may make a Nuncupative Will, or a Teſtament in writing, if it be read to him, and he declare he heard and underſtood it. Blind.

A perſon convicted of High Treaſon, cannot Traitor.

cannot make a Will, for that he hath forfeited all his Eſtate both real and perſonal whatſoever. But if he obtain a Pardon, *Quære*, what he may do.

Felons. Felons forfeit their lives, Goods and Chattels, and the profit of their Lands for a Year, Day and Waſte: and after the King hath had *annum, diem & vaſtum*, the chief Lord of the Fee ſhall have it, except in the County of *Glouceſter*, where the next Heir after the Year and Day ſhall inherit; and in Gavel-kind Lands where they deſcend equally to Sons, and for default of Sons to Daughters in like manner: And there it is ſaid, *The Father to the Bough, The Son to the Plough.* So that Felons cannot make Teſtaments of what the Law hath made *a prior* diſpoſition. But if a Man be indicted of Felony, and dye before conviction, he may deviſe his Goods and Lands, or if upon his arraignment he ſtand mute, his Goods ſhall be confiſcate, but he may deviſe his Lands.

For a Felon attainted at the time of the Fact committed, in ſuch caſe it is to be regarded in reſpect of his Lands: But for his Goods, the time of Judgement muſt be reſpected; for before

Judge-

judgement he may give his Goods, for neither the Sheriff nor other person can seize before conviction.

A Heretick doth not forfeit his Lands unless he be executed, nor Goods unless he be convicted and delivered over to Lay-mens hands, yet if he be but excommunicate, he cannot make a Will. Heretick.

Apostatas are of three sorts. 1. Such who having once been Christians renegue their profession, and become *Jews* or *Turks*; and such an Apostate was *Julian* the Emperour, who from thence had the infamous Sirname of, *The Apostate*: 2. Such as being subject, refuse to obey the command of the Ordinary or Superiour, as our now *Sectaries* and *Nonconformists*. 3. Such as have entred into Holy Orders, and afterwards throw it off, and become lay in habit or profession, and these are all reputed as bad, if not worse than Hereticks. Apostate.

A *Sodomite, qui peccatum inter masculos & contra naturam cum fœmina*, is barred to make a Will, although he be not convicted. Sodomite.

An Outlawed person is out of the protection of the Law, and all his Goods and Chattels are forfeited, be the cause of Outlaw.

Action

Action juſt or unjuſt, *Doct. and Stud. Lib. 1. Cap. 6.* in fine, if one be outlawed for Felony he ſhall forfeit Goods and Lands, but in Action perſonal the contrary, if any Errour or diſcontinuance be in the ſuit or Proceſs whereby the Outlawry becomes reverſable, as where the party is beyond the Seas; where three proclamations are not made, whereof one in open Court, another at Quarter-Seſſions, and a third at the Church or Chappel-door where the Defendent dwelleth; or laſtly, where the party hath obtained his pardon.

In extream. One at the very point of death, if he be of good memory, though you can ſcarce underſtand what he ſpeaks, yet may make his Will, and it ſhall be good.

A written Will is brought to a ſick Man, and he is asked if that be his Will, and he anſwers yea; this Will if it were written by the ſick Mans privity, or directions it will be good; otherwiſe it is held contrary.

Religious. Eccleſiaſtical perſons are either Regular or Secular; The Regular are Monks, Friars, *&c.* And if ſuch a Regular Clerk make his will at his entrance into Religion, it muſt be then alſo proved, and the Exe-

Executor muſt enter as if he were actually dead; for he is accounted dead in Law in reſpect of his Vow, and therefore totally diſabled to make a will afterwards. The Secular are Biſhops, Vicars, *&c.* and theſe may make a will, ſo as the Goods they diſpoſe thereby be not held by them in right of their Church: for they may not deviſe the Fruit of Trees growing on the glebe. Howbeit Corn growing upon the glebe belongs to him, his Executor or Adminiſtrator, but of other Fruits, Tythes, Oblations and Emoluments, the next Incumbent ſhall have them towards payment of his firſt-fruits: and if he dye his Executor, 28 *H.* 8. 11.

CHAP. III.

What things may paſs by Will, and how much. 1. *Of Lands.* 2. *Of Goods, and Chattels: And of the tuition of Children, to whom, and how it ſhall be granted or committed.*

LAnds are deviſable, either by Cuſtom or by Statute. By Cuſtom, ſuch are Gavel-kind Lands, (which are not confined only to *Kent*, as hath been erroneouſly held from the Grant of *William* the Conquerour) And one ſeized thereof may give or ſell them at his own pleaſure: neither are they forfeitable for Felony, according to the Adage, *The Father to the Bough, The Son to the Plough.* 2. Lands held in Burgage-tenure by Cuſtom deviſable in divers Cities and Burroughs. And ſuch Land may be given in Fee-ſimple, Fee-tail, for Life, or Years, ſo as the Will be enrolled before the Mayor, neither is it needful to have it written according to the form of the Statute of *Hen.* 8. for that the Land was deviſable

deviſable before that Statute, and is a kind of a Socage-tenure.

Citizens, Burgeſſes and Free-men may deviſe their Lands in Mortmain, which others who have Burgage Lands may not do, otherwiſe there is no difference. But joyntenant of Burgage-Lands cannot deviſe his part, for it will paſs by ſurvivourſhip.

The Cuſtom of deviſing Lands to Feoffees reformed by 27 *H.* 8. which ſee at large. As alſo the *Stat.* 32 *H.* 8. whereby Lands may be deviſed.

A. having Lands in Socage may deviſe all except he have Lands of the King or others in Knight-ſervice, but in ſuch device there muſt be reſerved *primer ſeiſin*, and fines for alienations, ſuch as ſhould have been, in caſe the Land had been altered or ſold.

If one hold Lands in Socage, and other Lands in Knight-ſervice, he may deviſe all his Socage Lands, and two parts of thoſe in Knight-ſervice, reſerving three parts for the King or other Lords of the Knight-ſervice Lands for Wardſhip and *primer ſeiſin*, *&c.* but this is in effect now out of doors.

If there be two joyntenants or more of

Land holden of the King, and one die, his Heir ſhall be in Wardſhip.

Lands, Tenements, Rents and other Hereditaments in poſſeſſion, reverſion or remainder may be deviſed as before.

Of Goods and Chattels all may be deviſed, yea as well things extant as things not in being at the time of the device, or during the Teſtator's Life, as Corn annually growing in ſuch Land; all Lambs coming of ſuch a flock, depaſturing in ſuch a Field next Year; but if no ſuch Corn or Lambs be; it is void.

By common Law; If *A.* grant *B.* an annuity of 10 *l.* to be taken out of his Coffers, and he have no Coffer, or out of his Lands in Dale, and he have none there: in both theſe caſes his perſon is chargeable.

By a deed of Gift made of all Goods, and Chattels, yet debts or things in action paſs not: Contrary it is of a deviſe by a Will; for if a debt, or thing in action be given to *A.* the Teſtator may make him Executor only to that, and *A.* may recover it in his own name.

If a man bequeath another mans Goods, by the Civil Law, the Heir muſt either buy them, or render ſo much in value

value to the Legatary. But both by the Common Law, and Law Eccleſiaſtical uſed in this Realm, ſuch a deviſe is judged void.

There are ſeveral ſorts of Goods which are ſaid not to be deviſable, as 1. Such as a man hath in the right of his wife, *viz.* Debts due to her, or things in action, or Chattels real, as Leaſes, for after the Husbands death, they return to the wife. 2. One may not deviſe Goods which he has joyntly with another, no though he make the other joynt Executor, yet he ſhall not be chargeable for thoſe Goods, but adjudged to have them as ſurvivour. 3. Neither may one bequeath thoſe things which he hath, as Adminiſtrator to another, for he ought not to convert thoſe to his own uſe, but therewith to pay the Debts and Legacies of the Deceaſed, and to diſtribute the reſt in *pios uſus*, and therefore bound to be accountable. 4. Albeit, the Executor of an Executor may adminiſter Goods of the firſt Teſtator, yet ſo may not the Executor of an Adminiſtrator, but there muſt be a particular Adminiſtration of them granted: Alſo an Executor may appoint an Exe-

cutor of the firſt Teſtator's Goods, ſo may not an Adminiſtrator. Howbeit, an Executor cannot give away the Goods of a Teſtator, no more than may an Adminiſtrator, for they are not properly his, but he muſt accompt for them. 5. Goods of the Realm, ſuch are the Crown and the Jewels thereof, are not deviſable. 6. The Maſter of a Colledge, the Mayor of a City or Burrough may not deviſe things which belong to the Burrough, City, or Colledge; ſo it is alſo of an Hoſpital and Church goods; (excepting upon the glebe growing.) 7. Goods *de jure*, belonging to the Heir are not deviſable, as Trees growing, the Heir-loom, *&c.*

Tenant in right of his Wife, ſows Lands, and bequeaths the Corn, the Legatary ſhall have it, and not the wife, otherwiſe it is of Corn and Graſs not ſeparated.

Tenant in Tayl makes Leaſe for Life to *A.* and dyes, the iſſue in Tayl recover Land againſt *A.* being ſecond in *formedon*, this is loſt.

A. hath a Daughter and dyes, his Wife great with child of a Son; the Daughter enters and ſows the Land, ſhee

ſhee ſhall reap, though the Son be born before reaping time; But if after the ſowing of Corn and before the Son born, the Mother recover Dower againſt the Daughter, and the ground ſown be aſſigned to her in Dower, ſhe ſhall alſo have the Corn.

Windows, Tables, wainſcot, Benches, and the like, fixed or mortiſed in earth go not to the Executor, but to the Heir, for they are parcel of the Free-hold and to remove them is waſt; Alſo Furnaces and Ovens, ſet in Mortar or Stone do belong to the Heir. Windows, &c.

Concerning the aſſigning of Tutors or Guardians; and the diſpoſing of Childrens portions during minority. Divers Cuſtoms are in *England* obſerved. Guardian.

A Father hath a paternal power and may appoint a Tutor or Guardian to his Child for a time, and the cuſtody of his portion.

All but the Heir and ſuch as are preferred in the life time of the Parents are to have filial portions of the Father's goods: But if there be no Teſtamentary, Tutor or Guardian, then the Ordinary may appoint the next of Kin, demanding the ſame, as in caſe of adminiſtration,

but if the Child be a Ward, the Ordinary may not do it. Neither can any one be a Tutor or Guardian, who may not be an Executor.

A Tutor or Guardian may be aſſigned to a Boy till 14. to a Female Child till 12. and then they may have Curators of their own chooſing.

If a Child be a Ward, the Guardian ſhall have him, and all his Lands, and offering him a convenient marriage and at reaſonable age, if they refuſe, he ſhall have the value of their Marriage, which ſhall be rated according to the value of the Land; but this is now taken away.

But in Socage Tenure, if the Land come by the Mother, the Uncle on the Father's ſide, ſhall have the Guardianſhip, *& ſic è contra*, and as ſuch ſhall account to the Pupil for the profits of his Land at his full age.

Of Fools and Ideots, the King by his Prerogative Royal, hath the tuition of the body, and the profits of the Lands; but after the Ideots death, the Land ſhall return to the next Heir.

Copy-holder Heir under 14 years of Age, ſhall have a Guardian appointed him

him till 14. as the Mother, or next of Kin.

A Tutor may be appointed for a time, either ſimply, or upon condition, nay more than one may be appointed.

If the Teſtator ſay, I commit my Children to the tuition of *A.* or I leave them to his hands, or to his government; or I deſire my Wife to take care of my Children, all theſe imply the Teſtators meaning to be ſo, and they ſhall be confirmed Tutors.

The Office of a Tutor is to provide for the Infant, faithfully to adminiſter his Goods and Chattels, and to account for all received by him: and if any take away the Pupil or his Goods, he may cite them, and make them reſtore them in the Eccleſiaſtical Court.

The Tutor may ſell *bona peritura*, but not Goods immoveable.

If a Teſtator Will that *A.* ſhall educate his Children, and have the diſpoſing, ſetting and letting, of his Lands, yet he may not ſell them, for the words, diſpoſe, ſet, and let, properly bear no ſuch meaning.

As to the diſpoſing of Goods, we are to obſerve, that moderate Funeral expences are to be paid out of the whole, and then Diſtribution

then debts, *quæque ſuo ordine*, but if the Executor pay Legacies, and there be not ſufficient left to pay Debts, he ſhall pay *de bonis propriis*, it being a waſt in him. *Cro. Eliz.* 646. the 5 Report *Duke* and *Littleton*'s Caſe. *Cheynyes* Caſe. 33 *Eliz. B. R.*

If there be a Wife and no Child, or a Child or Children, and no Wife, the Goods ſhall be divided into two parts, and the Teſtator can but deviſe one half; but now ſee the *Stat.* 22 *Car.* 2. *Cap.* 11.

And if there be Wife and Children or Child, which Child is Heir, or which Children were advanced by his Father, in his life time, in ſuch caſe, the Wife ſhall have half, and the Teſtator may diſpoſe of the other moiety. But ſee *Ratcliff*'s Caſe. 3. Rep. But it is alſo held that a Child preferred ſhall have as in *Hotchpot* if he will caſt in his ſhare. See *Fitzh. and Brook. de rationabili parte bonorum.*

Although the Law leaveth all to be diſpoſed of by the Teſtator, yet in many places he is reſtrained by Cuſtom. But note, it ſeemeth he may diſſeize of Leaſes, eſpecially where it is cuſtomable for the Wife and Children to have a *ratable*

part

part of moveable Goods and Debts. *Bro. Tit. Exec.*

Patrimonium patris munus, becauſe it is to prefer.

Matrimonium matris manus, becauſe ſhe is to nouriſh and breed up the Child.

If *A.* be ſeized of 30 Acres, and have iſſue 2 daughters, and he beſtow 10 Acres in Frank-marriage with one of them, and dye ſeized of 20; the married Siſter may caſt up in *Hotchpot*, and have a new diviſion and moiety.

CHAP. IV.

Expoſition of Teſtaments.

TEſtaments ſhall be favourably expounded, and according to the intent and meaning of the Teſtator (which intent ought to be manifeſt and not doubtful. *Co. 6. Wild's* Caſe) becauſe he is ſuppoſed to be *inops conſilii.*

Words in a Teſtament ſeeming to tend to a condition, as (if, Provided, and ſuch like) ſhall not be taken in Law for conditions, where the intent of the Teſtator, appeareth

appeareth not to defeat the whole Eſtate deviſed thereby, but for a limitation; as for example. *A.* ſeized of Lands in Fee, hath iſſue *B*, which Lands he deviſeth to *C.* in Tayl, the remainder to *D.* in Tayl, with divers other remainders, Provided, that if any of the In-taylees, bargain, or ſell the Land, or any part thereof, that from thenceforth, ſuch perſons ſelling, ſhall be utterly excluded, and the Land to remain to the next in Tayl, as if ſuch perſon had not been named in the Teſtament; in this caſe the expoſition ſhall be, until ſuch Perſon in the In-tayl ſhall alien, he ſhall have as before: and ſo it is a limitation, and not a condition. For if it were taken for a condition, then *B.* his Son ſhould enter, for he only is *prius* (and none but *prius es* may enter for a condition broken) and then all the Eſtates were determined, which were contrary to the intent of the Teſtator. But by limitation it is otherwiſe. *Plow. fo.* 412. *Scholaſtica*'s Caſe.

Only ſuch Eſtate as cannot be by the rules of the Common Law conveyed by an Act executed in the life of the Teſtator, with advice of Counſell, ſuch Eſtate cannot be deviſed by Teſtament. As if

A.

A. deviſe Land to *B.* in Fee, and if *B.* do not ſuch an Act, that *C.* ſhall have the ſame to him, and his Heirs; this is void: for ſuch limitation if it had been by Act executed, had been void. *Et ſic de cæteris Co. Rep. Corbet's* Caſe *fo.* 86.

CHAP. V.

Of the Forms of Teſtaments.

THe ſubſtantial or eſſential form of a Teſtament is the naming of an Executor, without which it is no Teſtament: for the Executor is in the place of the Teſtator, and compellable to pay Debts ſo long as he hath Aſſets; without naming an Executor it is but a Codicil, be there never ſo many Gifts or Legacies contained therein, and Adminiſtration is to be granted, as of one dying inteſtate, unto the Wife or next of Kin.

But be it ſolemn, or unſolemn, written or *nuncupative*, priviledged or unpriviledged, the naming or appointing of an Executor without more ado, makes a good Teſtament.

An

An Executor may be appointed ſimply or conditionally, from a time or to a time certain, generally or particularly in the firſt, ſecond, third or fourth degree. Simple nomination, as, I make, Inſtitute or Will that, or deſire that *A.* be my Executor, or *A.* ſhall, or let *A.* be my Executor, or I commit all my Goods to diſpoſe of by *A.* or I will that *A.* diſpoſe of thoſe Goods in his poſſeſſion; in the firſt he ſhall be adjudged Executor of all; In the ſecond of ſo much as are in his poſſeſſion only.

The word Executor needs not always to be expreſſed in a Will, but *circumlocutory* words will ſerve, ſo as the Teſtator's meaning be certainly known, but when it is doubtful whether the perſon named be a general Legatary or Executor, great care muſt be taken to determine, whether a Will or not a Will.

A Teſtator makes his Will by entreaty or interrogation of another perſon, as if one demand if he will make *A.* Executor, and he anſwer yea, or I do, this is a good nomination, ſo as he be then purpoſed and intended to make his Will; for be the words never ſo plain, if the Teſtator were in fear, jeſt or drink, though he ſay I make

make *A.* my Executor, yet it is void, because he had not then *animum testandi.*

As nomination of an Executor is pure and simple, being without condition, so of Legataries, *mutatis mutandis*, in all things always according to the Testator's meaning: Therefore if *A.* devise to *B.* all his Lands and Tenements, all in possession and reversion pass by the word Tenements.

Land is devised to *A.* to have for evermore, or to him and his Assigns, there the devisee hath a Fee-simple; but in a Feoffment, such words create but an Estate for the Feoffee's life.

A devise of Lands is made to *A.* thus, to give or sell, or do with at his pleasure, this makes a Fee-simple.

A devise of Land is made to *A.* and his Heirs males, this is an Estate Tayl, but in a Feoffment the same words make only a Fee-simple, because thereby it does not appear of what bodies the Heirs shall be begotten.

Lands are given by deed to *A.* and the Heirs males of his body, he hath issue a Daughter, who hath issue a Son, and dies, the Son of the Daughter shall not have it, but it shall return to the Donor.

But

But if the ſame were ſo given by a deviſe in a Will, he, *viz.* the Son of the Daughter ſhould have it.

A deviſe made to an Infant in the Mothers Womb is good, but contrary of a deed Feoffment, grant or gift, for they being made to ſuch are void.

A deviſe is to *A.* and his Heirs Females of Land, the Deviſee hath a Daughter and Son, and dyes, in this caſe the Daughter ſhall have the Land, and not the Son though he be Heir.

A deviſe of Land is to *A.* charging him with payments, of near the value of the profits during his Life, though there be word of Heirs, or Aſſigns, or for ever, yet this is a Fee-ſimple; But a deviſe of Land to *A.* in Fee, and if he dye without Heir, then to *B.* in Fee, this is a void remainder, becauſe one Fee-ſimple cannot depend upon another. So Land was deviſed to the Prior and Covent of *B.* ſo as they paid to the Dean and Chapter of *P.* 10 *l. per annum*, and in default thereof, their Eſtate to ceaſe, and the Land to remain to the Dean and Chapter, this is a void remainder, for it could not be limited after an Eſtate in Fee, and the Heir, not the Dean and Chapter ſhall take advantage of the condition.

A

A Legatary may take his Legacy without delivery by the Executor; But there is no remedy to recover a Legacy by the Common Law, but only by citation before the ordinary: But a Legatary poſſeſt of his Legacy, at the Teſtator's death, may retain it, if there be ſufficient to pay debts beſide.

Conditions ſome are, 1. Neceſſary. 2. Some impoſſible. 3. And ſome poſſible or indifferent.

1. Neceſſary in reſpect of Fact, as if the Sun riſe. 2. Neceſſary in reſpect of Law, as a condition to make one Executor or give 100 *l.*

2. Impoſſible conditions, and theſe have four ſorts of Impediments. 1. Of Nature, as to give one 100 *l.* if he touch the Sky with his hands, or drink up the Sea. 2. Contrary to Law deemed impoſſible, as if he murder a Man, or deflower a Maid, for *id poſſumus, quod de jure poſſumus.* 3. Hard to be performed, as a baſe Subject to marry the King's Daughter. And 4, of contrariety and repugnancy.

3. Poſſible conditions or indifferent, of theſe, 1. Some are caſual as to give 100 *l.* if the King of *Spain* dye this year,

2. Others are Arbitrary, as if one go to Church. But here note, that conditions, unlawful, impoſſible and diſhoneſt are abſolutely void.

Every condition muſt be preciſely performed, for performance in part will not ſuffice, for the whole meaning of the Teſtator therein, muſt be performed.

A condition that one go to Church on *Eaſter*-day, and he endeavours ſo to do, but he is hindred by great floods, or other lawful impediments, the condition is performed: But if in going to Church he commit an offence, and be ſtayed for it; this is not a performance of the condition, when the condition cannot be performed by the Teſtator's default, this is no bar to the Legacy, as a Legacy is given on condition, that he bury the Teſtator's body in St. *Peter's* Church in *York*, and he dyes excommunicate.

Executor or Legatary under ſome poſſible condition admittable, putting in caution to perform the condition, or make reſtitution.

Condition is, that *A.* marry the Teſtator's Daughter, he is ready and willing,

willing, but ſhe refuſes, this is doubtful, for he muſt perſevere if he will have the benefit, for though it ſeem the condition be performed in Law, yet is it not performed in fact according to the Teſtator's meaning: But it is contrary if the Teſtator remitteth to him a Debt upon ſuch condition, and he offereth to marry her: or if he be poſſeſſed of the Executorſhip, or Legacy in the mean time before ſhe repent, or if 100*l.* in ſuch a cheſt, or a white horſe be given on ſuch condition, upon the firſt refuſal, the Executor or Legatary will have a right.

Condition is, he or ſhe marry according to the appointment, arbitrement or conſent of *A.* the condition is unlawful, but the Legacy is good, though the marriage be without ſuch conſent.

Condition is, that thou marry not a Widow, or this, or that particular Woman is good, and if thou perform it not, no Executorſhip or Legacy ſhall paſs, becauſe thou haſt liberty beſides.

A Legacy is given upon condition, that thou marry the Teſtator's Daughter, thou muſt not marry firſt another

Woman, and afterwards her; for it is a condition affirmative, and intended to be meant of first marriage, and so the Legacy is void. But in negative conditions, as if thou do not marry the Testator's Daughter, here if thou marry two or three, and her at the last, yet the Legacy is good, for here not the first Act alone, but all subsequent Acts are regarded.

A Condition, in respect of place is good: As that one shall not marry at *York*; for he is at liberty to marry elsewhere.

Land is given to a Man, and the Heirs of his body, on condition, he nor his sell by Feoffment, *&c.* Here, if he or his Heirs sell; the Donor or his Heirs may enter, for this is in favour of others, and herein the Common Law, and the Ecclesiastical agree.

Prohibition in a Will, to sell a Cup, Ornament, Gift of a Prince, Prize got in War, *&c.* is good, unless the Goods will not amount to pay Debts: or if it be so far from him, that he cannot have profit or use of it, he may sell it, or if he be the last to whom it is limited.

One

One by his Will giveth *A.* the reſidue of his Goods, and makes him Executor, on condition he do not ſell the ſame; *A.* muſt enter into Bond not to ſell, before he can be admitted Executor: which Note,

As to time when conditions are to be performed, when no certainty thereof is expreſſed; it muſt be done as ſoon, as with conveniency it may after the Teſtator's Death.

A. makes *B.* Executor, on condition that he give 10 *l.* to the Poor, he may do it at any time in his life; but the Ordinary may appoint the time, and if he fail, may grant Adminiſtration. But a Legacy given on condition that he give 10 *l.* to the Poor, he muſt do it as ſoon as he is able after his Teſtator's Death, or elſe he will loſe his Legacy.

There are alſo caſual Conditions, as if a Ship come from *Venice*, thou muſt attend, and if it come in thy Life, good: but if thou dye before, thy Executor cannot have it, though it return after thy death.

Condition is, (if ſuch a one dye without iſſue, this is much to be taken notice

of,) for a Baſtard ſhall not be deemed iſſue, though the Parents inter-marry after the birth, and ſuch are iſſue natural, not lawful, nor may they inherit. But if *A.* have iſſue by *B.* his Wife, this is lawful, not natural; ſo if one marry a Woman, with child by another, albeit born the next day, yet the Husband muſt be Father; *For whoſe is the Cow, his is the Calf.* If a Wife cohabit with an Adulterer, yet if it be poſſible that the Husband may come to her, the Husband ſhall be preſumed the Father, nay though the Wife own the Adulterer, and the Child be like him, for that might happen by the Mothers conceit, at Conception, ſo *Jacob*'s rods, *Ethiopian* picture, *&c.* but if the Husband were not at the time of Conception, within the four Seas, or far diſtant, or impriſoned, it will be judged otherwiſe; Alſo if diſabled by Nature or old Age. In no caſe, ſuch Children ſhall inherit.

If a child be born alive, and heard cry, the Father by the courteſy of *England*, ſhall have the Land for his Life, otherwiſe if it were an abſolute abortion.

Remedy

Remedy for Creditors and Legataries, during the ſuſpence of the Condition.

For they are due preſently; therefore it is provided by the Statute of 21 *H.* 8. and 32 *E.* 3. that Adminiſtration be granted to the Executor for ſo long time as the condition depends.

If a Condition be delayed to be performed by an Executor, it being in his power, it is his fault, and he ſhall be excluded.

An Action againſt an Adminiſtrator ſhall abate, if there be an Executor which will prove a Will, after the Adminiſtration granted. The Ordinary may appoint a time to every Executor at the petition of Creditors to prove the Will, and if he refuſe, Adminiſtration may be granted unto ſuch as have intereſt until the condition be extant; or he may grant a Letter *ad tollendum bona defunctii*, but upon ſuch letter an Action will lye againſt the Ordinary, as it might have done againſt the Adminiſtrator, yea though ſuch one ſell *bona peritura*, he may be ſued as Executor in his own wrong.

Ten pound a year given to one by a Teſtator, till his Son attain 21 years of Age is good, till he ſhould attain, though he dye in the mean time.

If the Executorſhip be only limited, and the time of Age not joyned to the ſubſtance, as I give to *A.* 100 *l.* and I Will the ſame be payed when he comes to 21 years of Age, and he dye in the mean time, yet the Executor or Adminiſtrator ſhall recover it.

An Executor may be particular as of his Goods, *&c.* in *York-ſhire*, or Univerſal as of all his Goods: the particular Executor is only chargeable ſo far as he Adminiſters, and cannot meddle with the reſt: But if one make *A.* an Univerſal Legatary, or give him the reſt of his Goods, and make no other Executor, he ſhall be deemed Executor, at leaſt Adminiſtration may be granted to him.

Two are made Executors, one dieth, his Executor may not joyn with the firſt Executor in the execution of the Will: and if ſuch Executor of Executor, have any of the Teſtator's Goods, the firſt Executor may have an Action for them, and if the ſurviving Executor dye inteſtate,

teſtate, yet the Executor of the Executor cannot meddle. Alſo if one Executor be a Babe, or beyond Sea, the other is admittable in the mean time.

If all or one Executor, refuſe to undertake the Executorſhip, the other may ſue or be ſued: But firſt there muſt be ſummons and ſeverance: but if the refuſing Executor afterwards become willing, he may joyn with the Executor and be admitted, and if he releaſe a debt due to the Teſtator it is good, ſo it be releaſed before judgement.

One releaſes a debt due to *A.* and after takes Adminiſtration of the Goods of *A.* the releaſe is void, for that there was no right of Action at the time when it was executed.

Two or more Executors, are named, all refuſe but *A.* and he proves the Will, and after maketh *B.* his Executor, and dyes, the reſt who refuſed may not joyn with *B.* but he may ſue, or be ſued alone, for the firſt Teſtator's Goods, *Bro. Tit. Exec. Dyer* 35. *fo.* 160.

Divers Executors are named, one getteth poſſeſſion of Goods, the other have no remedy againſt him for any part, for one Executor may not ſue another,

ther, but in caſe the Teſtator give to one Executor the reſidue of his Goods, he may retain them or ſue any other that holds them; but if he give all his Goods to his Executors, they are to be divided and the Ordinary hath power to prevent fraud among them. But if one Executor dye, the ſurvivour ſhall have his part, unleſs the Teſtator appoint that the Goods ſhall be equally divided, for thoſe words (equally divided) in a Will, do make a Tenancy in common.

Two Witneſſes void of exception, ſufficient to prove a Will: but if the Teſtator ordain that one Witneſs whom he nameth and truſteth ſhall prove the Will, and he doth it, this is good proof; But a ſolemn Teſtament muſt be proved by ſeven Witneſſes, and every one muſt ſet his Hand and Seal to it.

Any Language, Hand, or Character is good for a Will, ſo that it may be underſtood, *& vitium Scriptoris* will not hurt, for as *falſa Orthographia non vitiat Chartam: Sic nec Teſtamentum.*

In Nuncupative Wills and Teſtaments it is good to avoid obſcurity and ambiguity.

CHAP.

CHAP. VI.

What Perſons may be capable of Executorſhip or Legacies.

A Teſtator may exclude his own Children, and make a Stranger his Executor, or Villain; if he make a Villain of his own Executor, it is a *manumiſſion*; but a Villain of another being named Executor, may have an Action againſt his own Lord.

A Woman ſole is Executrix, ſhe marries, her Husband alone may releaſe a Debt due to the Teſtator.

An Infant Executor, may releaſe a Debt due to his Teſtator, during his Minority, ſo as he receive due ſatisfaction for the ſame.

If a Child be under 17 years, he muſt have a Tutor, and ſuch Tutor may ſell any of the Teſtator's Goods, but for neceſſity only.

A Teſtator making his Debtor Executor, the Debt is extinguiſhed if he prove the Will: Alſo making a Creditor Executor, when he makes an Inventory, he may detain his own Debt firſt.

A. and *B.* bound to *C.* for Money, *C.* makes *A.* Executor, by this the Bond is releaſed; *A.* indebted to *C.* the ſaid *C.* makes *A.* and *F.* Executors, *A.* dies, *F.* ſhall have no Action againſt the Executor of *A.* for that Debt: But if the Teſtator be indebted to *A.* and makes him and *B.* Executors; if *A.* refuſe to prove the Will, and *B.* prove it, *A.* may have Action for his Debt againſt *B*: ſo Debt by Teſtator is not extinguiſhed by naming a Creditor Executor, unleſs he Adminiſters: But Debtor refuſing to Adminiſter, being named Executor, the Debt is extinct unleſs there want Aſſets to pay Creditors.

A Colledge, City, or Univerſity, may be appointed Executor: but an *Apoſtate* is incapable to take or make Executor: So Felon attainted, and excommunicate perſons.

Church-

Church-Wardens, are no lawful Corporation in every reſpect, but in ſome reſpects they are ſuch a Corporation, as may ſue for a Legacy given to the Pariſh.

Convict Recuſant at the Death of the Teſtator, or time of Adminiſtration granted, diſabled to be Executor, Adminiſtrator, or Guardian in Socage or Chivalry. See the *Stat.* 3. *Jacobi.*

CHAP.

CHAP. VII.

Of the ſeveral kinds of Executors.

THere are three ſorts of Executors. 1. From the Law, as the Biſhop, or Ordinary. 2. The ſecond is made by the Biſhop or Ordinary. 3. The third by the Teſtator himſelf.

If an Executor refuſe, or cannot prove the Will, the Ordinary may grant Adminiſtration, *cum Teſtamento annexo*, and this Adminiſtrator is charged to perform that Will, and is called *Executor Dativus*, for he is the Ordinaries Deputy or Steward.

The Ordinary may call to an account, and revoke his Authority, and ſuch revocation may be ſecret or implyed, as Adminiſtration granted to *A.* and after to *B.* the grant of the later revoketh the firſt, as a latter Will revokes a former, yet all Acts done by *A.* before ſuch revo-

revocation are good, 27 *H.*8. 26. *per. Fitz.* 4 *H.* 7. 14. *per Tremaile. Bro. Novel* Caſes 330. *Executor Teſtamentarius*, being one ſo made by the Teſtator, may without Authority from the Ordinary poſſeſs himſelf of his Teſtator's Goods and Chattels, and after probate of the Will, may commence Actions. But if he be a meer Executor, he may not convert the reſidue of the Goods to his own uſe, but be accountable for them, neither is he to have any other benefit than what is appointed by the Will, or allowed for his charges or pains by the Ordinary, and if ſuch Executor dye inteſtate, from thenceforth his Teſtator ſhall be ſaid to dye inteſtate, and Adminiſtration *de bonis non Adminiſtratis* ſhall be granted.

An Executor (ſome ſay) is not compellable to prove the Teſtament before citation: but if he be cited and refuſe, he ſhall loſe his Legacy, and the Ordinary may grant over Adminiſtration to another, until he will accept, *&c.* but if he hath meddled with any of the Teſtator's Goods, he is compellable to ſtand to it.

If Adminiſtration be granted, where a Will may or can be produced, and the Executor hath not refuſed, the Executor may

may bring an Action of Treſpaſs againſt ſuch Adminiſtrator, if he meddled. *Vid. Br. Abridgement des caſes edit* 1599. *Tit. Adminiſt.* 112. *fo.* 183.

To him that is deſirous to know, whether it be better to accept, or refuſe Executorſhip it is to be known. That,

Executor is chargeable to Creditors ſo far as the Goods do extend, but for Debts due to the Teſtator, he ſhall not be charged with Aſſets, for they are things in Action, and not in Poſſeſſion, yet he muſt uſe diligence to obtain, and get them in.

The Heir ſhall have none of the Goods or Chattels of the Deceaſed, nor ſhall the Executor have any of the Lands, Tenements, or Hereditaments, unleſs the Will appoint them to ſell Lands, for which if two or three be appointed, and ſome refuſe to prove the Will, the reſt that prove it may ſell notwithſtanding.

If the Teſtator appoint his Executor to ſell Land, and to diſtribute the money in *pios uſus*, and they enter and convert the profits to their own uſe, for two or three

three years, the Heir may enter upon them, and exclude them, for the Frank-tenement is in him; neither if one Executor dye before ſale, may the ſurvivour ſell, but contrary if the limitation be for payment of the Teſtator's Debts, for then the ſurviving Executor may ſell. 39 *Aſs.* 17. And it ſeemeth by the iſſue in that Book that any one of the Executors may by himſelf ſell the Land without his Companions though they be alive, and notwithſtanding that they have but a power and Authority given them, which is joynt, and in moſt caſes muſt be performed according to the limitation, but it ſeemeth that, that is admitted for the ſpecial reſpect the Law hath to have the Debts of the Deceaſed paid. *Vid. Fitz. Tit. Aſs:* 336. *Et Executors* 117.

An Executor may recover or diſtrain, for Rents, Fee-Farms, Annuities, and Arrearages, as his Teſtator might have done; Alſo the Husband may do the like, for rent due to his Wife ſhe being dead.

An Executor of an Executor in all caſes may ſue for the firſt Teſtator's Goods, and be ſued for his Debts, as the firſt Executor might: neither ſhall the

Goods of the first be put in Execution for the second Testator's Debt, but those Goods must come to the second Executor by relation, and thereby the property of them which was before in the first Executor, is conveyed to his Executor.

A. being Administrator to *B.* names *C.* his Executor and dyes, *C.* may not meddle with the Goods of *B.* but new Administration shall be granted to the Friends of *B.*

If an Executor after due admonition given, refuses to prove the Will, he shall lose his Legacy, but contrary if he were not summoned to stand to it. Neither doth a Wife lose her thirds, nor Children their filial portions by refusing to prove the Will.

A Wife Executrix cannot sue or be sued without her Husband, but she may do any extrajudicial act, as receive or release Debts, or pay Legacies without her Husband: But if she dye he can no more meddle: And such Wife Executrix may make her Will, and name an Executor.

If there be three or four Executors, two or one may release any Debt without his companions, unless it be upon Judge-

Judgement: But it is not so with Administrators, for they have but one Authority given them by the Bishop over the Goods, which Authority being given to many is to be executed by all of them together.

An Executor must pay Debts, before Legacies, else if thereby arise a want of payment of Debts, he shall pay out of his own Estate. Here note, that of Debts, some are to be preferred before others, *Cro. Eliz.* 646. as Judgement before Recognizance, &c. 5 *Rep.* 28. *Harrison's* Case, *Leon* 3. 270. *Bond* and *Bayl's* Case. So some Legacies are to be preferred. 28, 29 *H.* 8. *Dyer* 32. 4 *Eliz.* *Dyer* 280, *or* 208 *Dyer.* 7 *Eliz* 232.

As to the time for proving a Will it is Arbitrary, first year or second, or when it shall please the Ordinary to send a citation. Time.

The duty of the Executor, is to prove the Will, pay the Testator's Debts, and Legacies, and make an account for the residue, and therefore the Inventory ought to be made before the Executor meddle with the Goods; Into which Inventory are to be put, Goods, Chattels, Merchandizes, all Rights and Leases, Office.

Emblements, Corn growing, (but not Graſs or Trees growing, for thoſe belong to the Heir, ſo do things affixed to the Free-hold, alſo Glaſs in Windows, nailed or not nailed, Wainſcot and the like) but all other Goods and Chattels are to be put into the Inventory, and the Ordinary may appoint a time to bring in the Inventory. *See the Stat.* 22 & 23 *Car.* 2. *Cap.* 11. But an Executor meddling with Goods, unleſs for Funerals, *&c.* not having made an Inventory, is ſubject to Eccleſiaſtical cenſure, although the Acts done by him before *Probate* are good in Law.

Teſtaments are to be proved before the Biſhop of the Dioceſs, except in certain Seigniories or Juriſdictions, or where there are *bona notabilia* in divers Dioceſſes; and good Debts amounting to 5 *l.* due by one or more in ſome other Dioceſs or particular juriſdiction, yet within that Province, do make *bona notabilia* as well as Goods and Chattels, real or perſonal.

If the Metropolitan pretend that a Man within any Dioceſs of his Province dye poſſeſſed of *bona notabilia*, where indeed he hath none, and grant Adminiſtration,

ſtration therefore of the Goods, this is not abſolutely void, becauſe the Metropolitan hath Juriſdiction in all Dioceſſes within his Province, yet nevertheleſs it is voidable. But if the Ordinary of a peculiar Juriſdiction, grant Adminiſtration of the Goods of one dying poſſeſſed of *bona notabilia*, this is abſolutely void, even for the Goods in his own juriſdiction: for the Prerogative Court ought to grant the ſame.

A Will is to be proved two wayes, the 1. in *Communi forma*, and here no perſon is cited, but the Executor makes Oath that it is the Teſtator's laſt Will. Or, 2. In form of Law, and this muſt be done *per teſtes* wherein there muſt be publication and a definitive ſentence.

A Will proved in common form in abſence of them which have intereſt, the Executor is compellable to prove the ſame again in form of Law, and if the Witneſſes de dead, it will endanger the whole Teſtament, unleſs 10 years be paſt ſince the *Probate*: But being once proved in form of Law, no more to be drawn in queſtion.

Fees due for *Probate* of Wills are, if the Goods be under 5 *l.* ſix-pence to the

Regiſter 5 if above 5 *l.* and under 40 *l.* three ſhillings ſix-pence to the Ordinary, and to the Regiſter one ſhilling. If above 40 *l.* to the Ordinary 2 *s.* 6 *d.* and as much to the Regiſter by 21 *H.* 8. For the copy of the Will and Inventory, no more than was payed to the Regiſter for *Probate*, or a penny for ten lines at the Regiſter's Election: upon forfeiture of the overplus taken, and 10 *l.* to the King and the Informer.

The courſe of Debts in order to payment we have already ſpoken of, we ſhall only here note, that if there be divers Obligations, the Executor may pleaſure which of the Creditors he pleaſeth firſt, and the other have no remedy, though Aſſets be wanting. *Doctor and Stud. Lib.* 2. *Cap.* 10.

If two commence Suits for ſeveral Debts, he that firſt obtains Judgement ſhall firſt be paid, an Executor may plead a dilatory plea, as in abatement of the Writ, by Eſſoyn, imparlance to one, and then another commence a Suit, to whom he confeſſes a Judgement, that Judgement ſhall be ſatisfied firſt, though the others Suit was commenced before: But an Executor may not plead a falſe plea to

delay

delay him that firſt commenced Suit. *Doctor and Stud. Lib.* 2. *Cap.* 10.

Mortuaries.

No Mortuary is to be paid under ten marks in moveable Goods, upon forfeiture upon *ſurplus*, and 40 *s.* to the party grieved, by 21 *H.* 8. neither is it payable but where accuſtomed, and due but in one place, where the party was moſt inhabiting.

Above ten marks clear, his Debts being paid, and under 30 *l.* ſhall pay for a Mortuary 3 *s.* 4 *d.* between 30 and 40 pound, 6 *s.* 8 *d.* above 40 *l.* ſhall pay 10 *s.* and this is to be paid before a Legacy without defalcation.

Account.

It is neceſſary that an Executor make his account and procure his diſcharge by Acquittance or otherwiſe, for he is ſubject to be called to an Account judicially, both by Creditors and Legataries, and that within a year, or when the Ordinary pleaſes, wherein he muſt declare what Goods and Chattels, have come to his

hand, what Debts and Legacies he hath paid, in which leſſer ſums may be proved by his own Oath, and greater ſums by Witneſſes: And the reſidue ought to be diſpoſed as heretofore in *pios uſus*, but the Executor hath uſually deteined them, upon pretence more Debts may appear. But ſee what is now to be done by the new Stat. 22, 23 *Car.* 2. *Cap.* 11.

In this account, all Funeral expences, juſt payments, and reaſonable charges are to be allowed.

An Executor not being reſolved to meddle as Executor, then muſt not Adminiſter the Goods as Executor, for then he is compellable to undertake the burthen: in the mean time he is ſubject to all ſuits of Creditors, and cannot ſue for want of the Will being under ſeal of the Ordinary.

If a Creditor take but ſo much of the Teſtator's Goods as his own Debt amounts to, yet he is Executor in his own wrong: But to take the Teſtator's goods to preſerve them from periſhing or to diſpoſe of part thereof for the Funerals, or to make an Inventory, makes him not Executor in his own wrong.

CHAP.

CHAP. VIII.

How Teſtaments become void.

TEſtaments become void by ſeveral means, as when they are made through fear, immoderate flattery, fraud, incertainty or imperfection, or the Teſtator hath not *animum teſtandi*. But if ſuch a Teſtament after the fear is paſt be confirmed or ratified, it will be good.

Errour in quality to avoid a Will is this, as I make my Couſin *J.* my Executor, or becauſe thou haſt lent me 100 *l.* I give thee 100 *l.* or for that my Son is dead, thou ſhalt be my Executor, when in truth there is no Couſin *J.* no Money lent, nor his Son dead.

Errour in quantity is, when a Teſtator meaning to bequeath a fourth part of his Goods, it is ſet down half, or intending to give 50 *l.* the Writer ſetteth down 100 *l.*

100 *l.* or *è contra*; or I give to *A.* all the Debts he or *B.* oweth, and he owes nothing, all theſe bequeſts will be void.

But if one give *A.* 10 *l.* which he owes him, if the Teſtator be in good memory at the time of the gift this is good. So if one give 10 *l.* being in ſuch a cheſt, and there are but 5 *l.* found, yet it will be good for the 5 *l.* But if the Teſtator believed 10 *l.* to be there, unleſs the Executor can prove that the Teſtator knew there was but 5 *l.* it ſhall be good for the whole 10 *l.*

A Will may alſo be void for incertainty, as I make one Man of the World my Executor, unleſs there be plain proof whom the Teſtator meant, it is abſolutely void.

One made his Will, and named *J. S.* his Executor, whereas there were two or three of that name, this ſhall be void to all, unleſs the Teſtator's meaning appear to one or one more familiar or friendly with him, then he ſhall be admitted; or if they be all of Kin, the neareſt of Kin ſhall be admitted.

If one give a Legacy to a Church, his Pariſh Church ſhall be underſtood, ſo a Le-

Legacy to the Poor, ſhall be intended to the Poor of his own Pariſh, but if he have any poor Kindred, they are principally to be regarded.

It hath been held that the Mother is not a Kin to the Child, and to that purpoſe it was long argued in the Duke of *Suffolk*'s Caſe, *39 H. 6. fo. 31.* but ſince hath been adjudged to the contrary, 3 Rep. *Ratcliff*'s Caſe, and *21 H. 8. 5.* Or if one make the next of Kin Executor, the Mother ſhall be admitted before any but his own Children, *viz.* before either Brother or Siſter, according to the *Stat. 21 H. 8. See Bro. Novel*'s Caſes *5 E. 6. Num. 415.*

A Teſtator gives a Horſe and hath none, yet it is a good Legacy: the contrary hath been held by ſome of Sheep, or a gold Chain, that if there be none, the Legacy is void, but the better opinion is that it is good.

A Legacy of Lead, Money, Wheat, *&c.* is uncertain, and ſo naught, but if it be added for building Bridges, repairing High-wayes, maintaining or relieving Poor, then ſo much as by the Ordinaries appointment ſhall be thought fit, ſhall go to perform the intent.

Bona

Bona animi, corporis, fortunæ, viz. Virtue, Health, Wealth, are by the civil Law termed. 1. Moral. 2. Natural. 3. Casual. The first and second are not in our dispose, and therefore the Law takes notice of the third, *viz.* casual, under which the civil Law takes in Lands, Leases, Obligations, Debts, and all other Goods, his Debts paid. But the Law of this Realm takes in only Houshold-Goods, Chattels personal, *&c.* But nothing that is of the Nature of Free-hold, nor Leases for years, (much less for life) nor *Choses* in Action, as Debt upon promise or Obligation.

Chattels signifie all Goods, moveable and immoveable, unless such as be of the nature of Free-hold; Of Chattels some be real, as Leases for years, some personal as moveable Goods, Money, Plate, Houshold-stuff, *&c.* but Hawks and Hounds are no such Goods.

Goods moveable are such as actively move of themselves, or passively are moved by others.

Immoveable Goods are such as are not dependent upon the person, but to some other things, as Trees growing, Fruit on Trees, Lease or Rent for term of years.

years. But no Lands, Tenements, or Franktenement.

Admit four ſeveral perſons, make four ſeveral Wills, wherein the firſt gives *A.* all his Goods, the ſecond gives *A.* all his Chattels, the third gives *A.* all his moveable Goods, and the fourth gives to *A.* all his immoveable Goods. In this caſe, *A.* is to have the firſt Teſtator's whole Eſtate, being in effect his Executor, Heir or Univerſal ſucceſſor: Alſo he is to have all his Debts, and pay all his Debts, and all his Money of what Coyn or Mettal ſoever. And ſo it is as to the ſecond Teſtator in all things, And if *A.* dye before he prove ſuch Will, Adminiſtration is to be granted to the next of Kin of *A.* not of the Teſtator: But the Teſtator giving *A.* all his Goods or Chattels, if he make *B.* his Executor, *B.* muſt enter to all, prove the Will, pay the Debts and deliver over the *reſiduum* to *A.* being Univerſal Legatary. But if the Teſtator have 100 *l.* and being indebted 20 *l.* bequeaths the one half of his goods to his Wife, the whole to be be divided, between her and *A.* his Executor, here the Wife ſhall have 50 *l.* without defalcation, and the Executor muſt

pay

pay the Debt out of the other half, which are Aſſets in his Hands, and this caſe was ſo adjudged by two chief Juſtices and others.

For the third Teſtator *A.* muſt have *bona moventia & mobilia*, all actively and paſſively moving or moveable, as alſo Fruits growing by Induſtry, as Corn, *&c.* but not Natural, as Graſs, *&c.* but if Land be appointed to be ſold by Will, the Money thence ariſing ſhall not be accounted as any of the Teſtator's Goods or Chattels: Or if a Teſtator have bagged up Money, ready ſhortly to be payed for Land bought, this may not be diſpoſed of in prejudice of the Heir. For the fourth Teſtator, by the word immoveable Goods, paſs all natural fruits, as Graſs growing, Fruit on Trees, Fiſh in a Pond, Pidgeons in a Dove-Coat, *&c.*

Goods moveable and immoveable, are given as a Legacy, it hath been much diſputed, if Debts and Obligations paſs, and it is agreed that they do, and alſo Rents and Arrearages thereof behind; but ſuch a Legatary of moveable and immoveable Goods cannot ſue for ſuch Rent, Arrear, or Debt in his own Name,

for

for the Executor must recover them, and then may he sue the Executor in the Ecclesiastical Court for the same, and if the Executor refuse to sue the parties, the Ordinary shall compel the Executor to give one or more, Letter or Letters of Attorney to the Legatary to sue for the same in the Executor's name, but to the use of the Legatary himself.

A. gives all his Housholdstuff to *B.* by this *B.* shall have Tables, Stools, Forms, Chairs, Carpets, Hangings, Beds, Bedding, Basons, Ewers, Candlesticks, all sorts of Vessels, serving for Meat, Drink, being either of Earth, Wood, Glass, Brass or Pewter, Pots, Pans, Spits, Kettles, and such like; But Books, Weapons, Tools for Artificers, Cattle, Victuals, Corn in a Barn, Carts, Plough-gear, and Vessels fixed to the Free-hold are not so esteemed.

Plate used in the House, as Cups, Bowls, Candlesticks, *&c.* are Housholdstuff, but such as are kept only for shew or Ornament, being no otherwise used, shall not be reckoned as Housholdstuff, unless the Testator's meaning appear in plain words otherwise.

If after a Testator's Death, there be found

found two Wills, the one made in favour of his Children; the other in favour of Strangers, that to the Children ſhall be confirmed. But if one Teſtament be proved, and the Executor poſſeſſed of the Goods, it is not afterwards to be diſproved, or he diſpoſſeſſed by means of another Will of the ſame date.

There are two Teſtaments, one to Children, another *ad pios uſus*, both of one date, that to the Children ſhall have the priority.

A Legacy is given of all his Debts, no more will paſs than thoſe Debts then due, not ſuch as grow due after the Will made. So if a Teſtator releaſes to *A.* all his debts, ſuch as grow due after the releaſe made ſhall not be diſcharged. The like of Apparel, Books, Houſholdſtuff, *&c.*

But in theſe and all Caſes the mind of the Teſtator muſt be reſpected.

A Teſtament begun, though not finiſhed is good, ſo far as it is proceeded in.

A draught of a Will not acknowledged by the Teſtator is no more a Will, than a draught of an Obligation is an Obligation unſealed.

A

A Teſtament found written, with the Teſtator's hand in a Cheſt amongſt other Writings of account ſhall be good; if the ſame be dated and perfect.

The laſt Teſtament is beſt, and doth abrogate and annull all former, although the Executor refuſe or dye before, or after the Teſtator. But if the latter Teſtament be imperfect or the Teſtator compelled by fear or fraud to make it, it is void.

A Teſtament made 10 years before death is neverthleſs good whatever after may happen: But a Teſtament is preſumed to be revoked, when the Teſtator and Executor become great Enemies; Alſo when the Teſtator in heat of Anger conceived againſt his Son, or ſuch as ſhould have Adminiſtration and afterwards they are reconciled.

A Teſtator after a Will made is attainted of Treaſon, Felony, Hereſie, or Apoſtacy, *&c.* unleſs he obtain a pardon or be otherwiſe reſtored, the Will is naught.

If an Executor cannot, or will not prove a Will, it loſes the name of a Teſtament, and muſt be affixed to an Adminiſtration, yet the Legacies, are ſtill due.

An Executor must be capable at three ſeveral times. 1. At the making of the Will. 2. At the death of the Teſtator. 3. At the time of *Probate* thereof. But in conditional Teſtaments, the Executor and Legatary being capable at the time of the condition to be performed is ſufficient.

Ademption of Legacies.

A Ship was given for a Legacy, which was afterward ſo repaired that little, yet ſome of the old remained, that makes the Legacy good; ſo of a houſe repaired after a Will made: but if the old houſe be wholly pulled down, and new builded of other ſtuff afterwards, this makes the Legacy void, ſo if blown down or fired by chance and new built: or if the Teſtator after the Will made, ſell or give away the ſame, this takes away the Legacy.

A Teſtator gives an Obligation to *A.* and after this the Obligor payes the Teſtator the Debt in ademption: but if the Teſtator conſtrain him to pay by courſe of Law, there the Legacy is extinguiſh'd.

Tranſ-

Transferring of Legacies,

From one to another; as a Legacy is given to *A.* provided if *A.* will not do such an Act to be void to him, and *B.* to have it: *A.* dyes, yea before he can do it, yet was always willing to have done it, here the Legacy is not transferred.

A Testator gives 100*l.* to *A.* upon condition he pay for 10 years 10*s.* a year to the poor of &c. and after he gives the same 100*l.* to *B.* without any condition, yet *B.* must perform the first condition.

Lands are given by Will, *viz.* in the beginning of the Will to *A.* in Fee, in the latter end to *B.* in Fee; this is to be decided by the Temporal Law, whereby *B.* is to have it, because it is the latter devise, *& ratio partis ad partem ut totius ad totum.*

If Legatary become Enemy to the Testator, or give him a secret cause of hatred, though unknown to the Testator, by which (it may be supposed) that if he had known it, he would have taken away or destroyed the Legacy, this will make the Legacy void.

If a Wife depart from her Husband without consent, or a Legatary accuse his Testator of a capital crime, or become a capital enemy to the Testator's Brother, or if the Legatary neglected to help him in sickness through want whereof the Testator perished, or grievously defamed or slandered the Testator, any of these will cause him to lose his Legacy.

A Legacy of 100 *l.* is given to *A.* to be paid him at *Easter*, 1675. *A.* dyes before *Easter*, yet his Executor or Administrator shall recover, because it was due at the death of the Testator. But if 100 *l.* be given to *A.* when she shall be married, and she dye before marriage, the Legacy is lost. But if it be given for and towards her marriage, and she dye before, yet her Executor or Administrator shall recover it.

Debt is brought against the Ordinary, who, pending the Writ, commits Administration to *J. S.* the first Writ shall abate, because the Ordinary is compellable to grant the Administration by the *Stat. Bre. Tit. Administ.* 39. 31 *E.* 3. *cap.* 11. *Rast. Administrators.* 1. *and* 21 *H.* 8. *cap.* 5. *Rast. Probate of Testam.* 3.

Where

Where the Ordinary commits Administration, he may revoke it and grant it to another (but all acts done by the first Administrator shall be good), and so it was held in the case between *Brown* and *Shelton* for the Goods of *Rawlins*, where the Administration was committed to *Brown* and revoked; and committed to *Shelton*, because it was not an interest, but a power or authority only; which may be revoked: but the contrary is held of an interest certain. *Bro. Administrator*, 33. *in fine.*

If an Executor plead fully Administred in an Action of Debt, and give in Evidence, payment of Legacies: The Plaintiff in the Action of Debt, may demurr in Law thereupon, because such Administration is not allowable in Law before Debts are paid. *Bro. Tit. Assets inter maines* 10.

An Executor before *Probate* makes his Executor and dyes, his Executor shall have Administration, 3 *Eliz. Dyer* 372. *Isted's* Case.

Where an Executor hath the *residuum* given him, there Administration shall be granted to his Executor, but where the *residuum* is not so given, the next

right of him shall have it. *Linsdon's* Case. 3 *Rep.*

I shall only add what hath very Learnedly been held by a most Worthy and Honourable Person; and of profound reading in the Law, concerning the Ecclesiastical Court, *viz.* That it had not Original Jurisdiction, and that what Jurisdiction the Church claims, was given to it by the King. and that is proved by four principal reasons.

1. That the Ordinary had not any power to dispose *bona peritura*. 9 *Eliz. Dyer* 255. 5 *Rep. Needham's* Case.

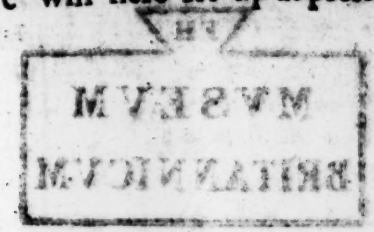
2. If a Debt were due to the Testator or Intestate, the Ordinary had not power to recover it, nor could he commit it. *Co.* 2. *Inst.* 398. *F. N. B. fo.* 91, 92.

3. It is a Lay thing, and some at this day have power to dispose, who are meerly Lay. *Co.* 5. 16. 5 *Rep. fo.* 65. *B.*

4. For the manner of Tryal, it must be in the Temporal Court. 13 *Eliz. Dyer* 294.

Much

Much more might be ſaid in this point, which for the greateſt part being mentioned in the fore-going Book. We will here ſet up at preſent our reſt.



FINIS.